In the Supreme Court of the United States.

October Term, 1907.

No. 167.

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, Petitioners.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

HARVEY RIDDELL,
Attorney for Wilbur F. Denious,
Trustee, Respondent.

Smith-Brooks Printing Co., Denver.

In the Supreme Court of the United States.

October Term, 1907.

No. 167.

IN RE JAMES B. WOOD AND JETHRO P. HENDERSON, PETITIONERS.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

STATEMENT.

Counsel for petitioners, Wood & Henderson, allege or assume in their brief certain facts which are neither disclosed by the certificate nor by the record of this proceeding in the Circuit Court of Appeals. It would probably be preferable to decide the questions certified on the certificate, or have the entire record certified to this court. One fact assumed by counsel, which neither the certificate nor record dis-

closes, is that Wood & Henderson have or make an adverse claim to the fund in question. It has been held by this court that the fact that the party who has possession of property claimed by the trustee refuses to surrender it, and contests the jurisdiction of the court to compel him to do so, as is being done by these petitioners, does not show such an adverse claim as will oust the bankruptcy court of jurisdiction, and if that is true then there is no foundation for counsel's statement that the petitioners make an adverse claim to the fund in question.

Mueller vs. Nugent, 184 U. S., 1.

Another fact assumed by petitioners, which does not appear in the certificate nor in the record of this proceeding in any court, is that the allowance made Wood & Henderson was not for services performed by them in preserving or collecting the assets of the bankruptcy estate.

It should be remembered that the petitioners have offered no testimony whatever in this proceeding, and that no objection has been made to the sufficiency of the petition of the trustee upon which the proceeding is based, nor to the sufficiency of the showing made by the trustee before the bankruptcy court. In seeking correct answers to the questions certified by the Circuit Court of Appeals, therefore, we may assume that a proper and sufficient petition was filed in this proceeding under section 60d, and that thereupon the bankruptcy court made an order requiring Wood & Henderson to appear and show cause, if any they had, why an order should not be made and entered determining the reasonable value of the services rendered and contem-

plated to be rendered by the said Wood & Henderson, as attorneys and counsellors, and notifying them that in default of their appearance the court would hear and determine said matter on the evidence presented by the trustee, and that a copy of the petition and order to show cause should be served on said Wood & Henderson at least twenty days before the hearing; that on the day set for the hearing Wood & Henderson did not appear either in person or by counsel, the court proceeded to re-examine the transaction set out in the petition, and found that Wood & Henderson had been properly served with the petition and order, and that the evidence showed such a transaction as comes within the provisions of section 60d, and made the order set out in the certificate, finding the value of the services rendered, and directing the trustee to recover the balance of the fund in the hands of Wood & Henderson. It should be remembered that Wood & Henderson did not assert before the Bankruptcy Court, as they are attempting to assert in this court, that they were not officers of the court, or that they made an adverse claim to the fund in question. Whether the bankruptcy court could have proceeded in this matter if Wood & Henderson had appeared and asserted a claim to the fund in question; whether the petition of the trustee was sufficient; whether the showing made before the bankruptcy court was sufficient, and whether the allowance made by the court to Wood & Henderson was for services rendered in preserving or collecting the estate, or in other matters—these are questions not involved here, and the discussion of them in counsel's brief would seem to be uncalled for.

ARGUMENT.

Question One.

We assume that it will not be disputed that a court of bankruptcy, in which the proceedings in bankruptcy are pending, would have jurisdiction under section 60d of the bankrupt act to re-examine on petition of the trustee such a transaction as is detailed in question one, in the instance where such attorney or counsellor at law, at the time of receiving such payment or property, and at the time of the proceedings in question, was a *resident* of the state or of the district in which the bankruptcy court instituting such inquiry is located, and where the money or property was so paid to and is held by such attorney or counsellor *within* the district in which such court of bankruptcy sits, and the order to show cause, citation or notice of the proposed hearing is served upon him *within* the district in which such court of bankruptcy sits. The conditions enumerated in question one, which are particularly pertinent here, are, therefore, the following:

1. "Where such attorney or counsellor at the time of receiving such payment or property, and at the time of the proceedings in question, was a *non-resident* of the state or of the district in which the bankrupt court instituting such inquiry is located."

2. "Where the money or property was so paid to, and is held by, such attorney or counsellor *outside* of the district in which such court of bankruptcy sits."

3. Where "the order to show cause, citation or notice of the proposed hearing is served upon him *without* and not within the district in which such court of bankruptcy sits."

These conditions raise the questions of jurisdiction of the bankruptcy court over the subject matter of this proceeding and of the persons of petitioners, which questions will be considered together.

The legal principles and reasons on which the jurisdiction of courts of bankruptcy rests, we believe have been misconceived by the petitioners. The challenge of jurisdiction because the petitioners are nonresidents of the state or district in which the bankruptcy court instituting this proceeding is located, and because the money was paid to petitioners and is held by them outside of the district in which such court of bankruptcy sits, and because the order to show cause, citation or notice of the proposed hearing was served upon petitioners without the district in which such bankruptcy court sits, is, we believe, contrary to the authorities and the spirit and purpose of the bankruptcy law. If this proceeding involved a controversy *at law or in equity*, as distinguished from a *proceeding in bankruptcy*, and if the United States courts sitting in bankruptcy were governed by the same statutory rules as when sitting simply as District Courts, the arguments and authorities of petitioners would be entitled to some consideration, but they are not pertinent to this proceeding.

The act of congress of July 1, 1898, creates bankruptcy courts with a jurisdiction separate and dis-

tinct from any and all other federal courts. While sitting in bankruptcy, the District Courts of the United States exercise a distinct jurisdiction different from that which they exercise while sitting as ordinary District Courts or Admiralty Courts. If congress had created courts of bankruptcy instead of availing itself of the District Court to administer the law, no one would think of measuring the jurisdiction of such bankruptcy courts by the law governing the jurisdiction of District Courts; yet District Courts sitting in bankruptcy exercise a jurisdiction as distinct from District Courts as such, as the jurisdiction of bankruptcy courts is distinct from Circuit or Admiralty Courts. By the bankrupt act, courts of bankruptcy are given exclusive jurisdiction to "cause the estate of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided" (section two, subdivision 7), and to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act" (section two, subdivision 15).

The exception in subdivision 7, "as herein otherwise provided," can not avail petitioners, because there is no provision in the act relating to the reexamination of transactions between attorneys and their clients, paying them money "in contemplation of bankruptcy" other than that contained in section 60d. And the rule that a trustee must resort to a plenary suit where the money or property is in the possession of a third person claiming adversely to the trustee, can not be invoked now (1) because there is no adverse claim made, and (2) because the express grant

of power in this provision of the bankruptcy act is to examine transactions in which the money is in the possession of and claimed adversely by the attorney. And the closing words of this subdivision, "and the excess may be recovered by the trustee for the benefit of the estate," renders it certain that the intent was to confer on the bankruptcy court power to re-examine summarily the transaction and determine the rights to the money and property held in possession by such attorney even under claim of adverse interest.

Section 60d of the act provides that "the transaction shall be re-examined by the court on the petition of the trustee or any creditor," and by subdivision 7 of section 1 "court" means "the court of bankruptcy in which the proceedings are pending, and may include the referee." The words "the court," as used in section 60d, therefore mean "the court of bankruptcy in which the proceedings are pending;" that is, the court of bankruptcy making the adjudication, and the grant of power being to that particular court, no other bankruptcy or District Court can exercise the jurisdiction. It has been, in effect, so held.

Furth vs. Stahl, 55 Atlantic, 29, 30.
Swartz vs. Frank, 183 Mo., 438, 444.

Furthermore, this section makes this a proceeding to "cause the estate of bankrupts to be collected," and to "determine controversies in relation thereto," within the purview of section 2, subdivision 7, as certainly as if specific reference were made to said subdivision 7.

In Furth vs. Stahl and Swartz vs. Frank, supra, it was held, in effect, not only that no court, except the bankruptcy court making the adjudication, had jurisdiction to re-examine the transaction, but also that no excess could be recovered by the trustee, unless the bankruptcy court had determined that the amount paid the attorney was unreasonable, and had determined what was a reasonable amount to be allowed the attorney and directed a recovery of the excess.

The Missouri court, after showing the payment to an attorney for services to be rendered is not an unlawful preference until adjudged to be unreasonable by the bankruptcy court, said:

> "No attempt is shown to have the federal court—meaning the federal court that made the adjudication—review the amount so paid, and the state courts have no jurisdiction to do so."

The view taken by the courts in these cases seems to be that, in the absence of a re-examination of the transaction by the bankruptcy court making the adjudication, the payment is conclusively reasonable, and is a preferred claim, and can not be recovered, even in a plenary suit. We believe this view is correct and can not be successfully controverted. The statute makes the re-examination in such case a necessary step in the administration of the estate, and it is therefore an administrative *proceeding in bankruptcy*, which, by the plain intendment of the section, saying that it shall be upon petition of the trustee or any creditor, is summary in its nature, to be had

upon due notice, as any other administrative proceeding.

No contention is made, and we believe no reasonable contention could be made, that congress would not have the constitutional power to grant to the bankruptcy court jurisdiction to determine the trustee's title to property, which some third person had obtained from the bankrupt within four months prior to the filing of the petition, and claimed adverse title thereto. The reason a bankruptcy court has not that power is because congress has not attempted to grant it. And no contention is made, or could be made, that congress has not the constitutional power to give a court of bankruptcy the jurisdiction which, we contend, it has under section 60d. But petitioners argue that courts of bankruptcy have not the power in the summary proceeding to take property from a third person, who claims title and possession adverse to the trustee, and that for the same reason they have no power to exercise the summary jurisdiction, under section 60d, of re-examining transactions between attorneys and clients, where the attorney claims adverse possession. But this reasoning is not sound, both because, under section 60d, no attempt is made to deprive the adverse claimant of the possession of the property, and because, by the very terms of section 60d, the court of bankruptcy is given the express power to re-examine a transaction in which the title and possession are held adversely.

But it is now the settled law that a bankruptcy court, without any express power, but simply by virtue of its general power to administer bankrupt estates, has jurisdiction summarily to determine whether a third person has any actual basis for his

claim of title. And if upon examination of the facts the bankruptcy court determines that the claim of such person is not bona fide or is colorable only, then it has jurisdiction to order the money or property to which such adverse claim is made, paid or delivered to the trustee.

Bryan vs. Bernheimer, 181 U. S., 188.
Mueller vs. Nugent, 184 U. S., 1.
In re Muncie Pulp Co., 139 Fed., 546.

And the finding which the bankruptcy court is authorized to make, and which it did make in this proceeding under section 60d, is analogous to the finding which it has jurisdiction to make under the ruling in Bryan vs. Bernheimer, and subsequent cases, where the property is in the possession of a third person claiming title and possession adverse to the trustee.

The plea of an attorney when served with an order to show cause under section 60d that the money was not paid him by the bankrupt "in contemplation of bankruptcy," and that the money was not paid to him for services "to be rendered," or that the service for which the money was paid was not within the purview of section 60d, is analogous to the plea of adverse title and possession discussed in the foregoing decisions. But the petitioners made no such plea, and they are in the same position that the petitioners were in in the case In re Granite City Bank, 137 Fed., 181, that is, they, in effect, concede the facts to be as averred in the trustee's petition filed in the bankruptcy court and challenge the jurisdic-

tion of the bankruptcy court to examine the transaction under section 60d.

And the finding of the referee that the money was paid by the bankrupt "in contemplation of bankruptcy" and for services "to be rendered," within the purview of section 60d, vests the court with jurisdiction to determine the reasonable amount to be allowed the attorney and order the trustee to recover the balance, just as the finding that an adverse claim is fraudulently made and is colorable only vests the court with jurisdiction to order summarily such third person to pay over to the trustee. In each instance the court has the right to find the jurisdictional facts. That the court's decision is wrong, if it is wrong, does not affect its jurisdiction. The power to decide right carries with it the power to decide wrong.

The Supreme Court of Missouri, in discussing the jurisdiction of the justice of the peace, said:

> "His jurisdiction to decide contrary to law was just as great as to decide in conformity with law. His power to decide right necessarily included the power to decide wrong. Error does not diminish jurisdiction. There is a broad and turnpike-like distinction between the existence of jurisdiction and its mere exercise."
>
> Howland vs. Railroad Co., 134 Mo., 474, 479.

The filing of the petition setting forth facts sufficient to bring the controversy within the purview of section 60d, and service of notice, gave the referee

jurisdiction to decide whether such facts were true, and such finding is conclusive until reversed by some higher tribunal.

> Freeman on Judgments (4th edition), section 135.

It is plain that no court, except the bankruptcy court making the adjudication, has jurisdiction to review a transaction coming within the ban of section 60d, and if, as petitioners contend, no review of such transaction can be had, unless the attorneys can be served within the territorial jurisdiction of the District Court making the adjudication, then a method has been discovered whereby a dishonest debtor can defeat the distribution of his estate among his creditors, and can laugh at the puny power of all bankruptcy courts and their proceedings.

The jurisdiction of the bankruptcy court in a matter of this kind is so plainly stated in section 60d that, so far as we have been able to find, it has never before been challenged, except in one case. In the case of In re Lewin, 103 Fed., 850, a similar petition was filed by the trustees, and the facts in that case, as shown by the opinion, were as follows:

> "That the petition was shown by the referee to one of the attorneys before the reference; that ten days' notice was given by the referee by mail (all in the same village) to the attorneys and the trustee, after the reference, of the reference and the time and place of hearing; that the attorneys, by mail, required of the referee 'a copy of the complaint and order of court,' and were by mail

informed that the petition was the one examined before by one of them, which they could have, to examine, at any time they should wish to call for it; that one of the attorneys appeared at the hearing, denying the jurisdiction of the court, and suggesting in writing that the report show that no copy of the petition was ever given to any member of the firm of attorneys; that the evidence be sent up with any finding that might be made, and that the purpose of the suggestions was to avoid any admission of jurisdiction. The referee complied with these suggestions."

Upon this state of facts the court had the following to say in reference to the jurisdiction of the bankruptcy court over the subject-matter and parties:

"The matter has now been heard upon the report, and the principal points made by the attorneys are as to the jurisdiction of the court, and the sufficiency of the notice of the hearing before the referee; and the case of Bardes vs. Bank, 175 U. S., 526, is especially relied upon as to the general jurisdiction of the court, and that of In re Rosser (C. C. A.), 4 Am. Bankr. R., 153; 101 Fed., 562, as to the regularity of the proceedings. The decision in Bardes vs. Bank, however, was as to the effect of clause 'b' of section 23 of the act, limiting the place of bringing suits by the trustee, and does not appear to have any appli-

cation to such proceedings as these, in which a re-examination of such transactions as that here in question is not only authorized, but expressly required, on such a petition as the one by which this proceeding was moved. This is not a suit such as is mentioned in that clause of section 23, but is an *administrative proceeding,* of which the bankruptcy court has express jurisdiction, given by this clause 'd' of section 60, if it would not have any by the general grant of jurisdiction over bankrupts and their estates, and of their attorneys in the proceedings, as officers of the court. This specific provision seems rather to have been intended for requiring specific vigilance in this quarter, and for providing for a recovery of any excess from the attorneys, than for any special grant of jurisdiction, which, however, it plainly gives. The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in Rosser's case, cited. He says, at page 159, Am. Bankr. R., and page 567, 101 Fed.:

" 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.'

> "There the proceedings against the bankrupt for contempt were held bad because no such course of proceedings was taken or notice given. Here the course of proceedings was by petition of the trustee, as the statute provides, and which fully sets forth the claim made and the relief sought. The notice of it was official, from the referee having the powers of the court in this respect given by law."

As plainly pointed out in the above case, this is not a *suit* brought by the trustee to obtain a judgment or to recover assets belonging to the estate, but "is an *administrative proceeding*, of which the bankruptcy court has express jurisdiction given by this clause 'd' of section 60." If a suit it could be instituted by the trustee alone, but by the terms of the act this proceeding may be instituted either by the trustee or any creditor. It is plain that it is simply an administrative proceeding to be instituted in the bankruptcy court. It being an administrative proceeding, no process is required, but notice to the interested parties is all that is necessary. If only notice is necessary, then it makes no difference about the residence or location of the parties or the place where the notice is served, provided the parties be given notice in time to appear and be heard. In this case there is, and can be, no claim made that there was not ample notice and opportunity to be heard.

In the Granite City Bank case, supra, the petitioners objected to the jurisdiction of the court for these specific reasons, viz.:

(1) "That neither the property referred to, nor the said Granite City Bank, is within the territorial limits over which the court has jurisdiction."

(2) "That no notice of the hearing upon the petition had been served upon the Granite City Bank within the territorial jurisdiction of the court."

(3) "That the court had no jurisdiction over the said Granite City Bank, and, without personal service upon the said Granite City Bank within the jurisdiction of the court, it had no jurisdiction of the subject-matter, to wit, the lien of said bank upon said personal property, said property being without the territorial limits over which the court has jurisdiction."

(4) "That the court is given no jurisdiction by the bankrupt act to order the sale of the property free from liens without first determining in some proper proceeding the validity of such liens."

See

137 Fed., page 819.

All of these objections were overruled by the referee, and his ruling, taking jurisdiction, was sustained by the court. It is there said (page 822):

"Counsel for the bank seem strangely affected with notions about state lines under the bankrupt act. They challenge the right to reach the bank in South Dakota by notice sent out by the referee in Iowa, and the right of the court of bankruptcy in Iowa to

draw the bank from its residence in South Dakota to determine its rights as a preferred mortgagee. Under the scheme of the bankrupt act, the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds pari passu among the creditors, according to their respective rights and priorities. Only one court—the court making the adjudication—collects, marshalls, administers, determines priorities of the parties, and directs the distribution of the assets. The bank could have appeared and contested at its pleasure the propriety of the referee ordering the sale of the property free from all liens, and the District Court of Iowa, and it alone, could pass upon the validity of the bank's claim to the proceeds of the sale of the property."

In re Granite City Bank, 137 Fed., 818.

PETITIONERS' ARGUMENT NOT APPLICABLE.

Taking up, now, the argument in the brief of petitioners on question one, as near as we are able to analyze the argument, we find the following propositions advanced by counsel:

1. That courts of bankruptcy are courts of limited jurisdiction.

2. That section 60d deals with preferred creditors and their claims, and that, as shown by the case In re Habegger, 139 Fed., 623, upon the re-examination of a transaction, such as set out in the petition in this proceeding, the bankruptcy court must make the attorney an allowance only for such services rendered as have been beneficial to the estate, and declare the transaction entirely void, except to the extent of the value of such services, thus construing sections 64b and 60d in connection with each other.

3. A transaction such as is described in section 60d can not be dealt with in a proceeding in bankruptcy—that is, in a proceeding in the bankruptcy court—but can only be adjusted by means of a plenary suit.

We shall discuss these propositions in the above order.

1. We agree with counsel that courts of bankruptcy are courts of limited jurisdiction; but this question becomes immaterial when we are considering the jurisdiction exercised by virtue of an *express* provision of the statute, as distinguished from their *general* powers under the statute. Where the jurisdiction is expressly conferred, then we are not concerned as to whether the court is a court of general or limited jurisdiction, the only question being whether the legislative branch of the government, which enacted the law, had the constitutional power to confer such jurisdiction. But no question is raised as to the constitutional power of congress to confer upon bankruptcy courts the jurisdiction which, we contend, they have under section 60d. It is conceded that congress has supreme and unlimited power in the matter of bankruptcy legislation. Whether the

courts of bankruptcy are courts of general or limited jurisdiction is therefore immaterial, since it has the jurisdiction which we contend for, if at all, under an express grant of power.

2. Counsel's second proposition is, as it seems to us, against, rather than in favor, of the position taken by them in this proceeding. They say, on page 6 of their brief, that section 60 deals with preferred creditors, and later in their brief (page 11) they say the parties to a bankruptcy proceeding "include the bankrupt, the trustee and all creditors." Again we agree with counsel. In the Habegger case, a case relied upon by them, the attorney to the transaction, which was re-examined by the bankruptcy court, is treated and called a "preferred creditor" by the court in its opinion. We contend that an attorney whose transaction with a bankrupt comes within section 60d is as much a party to the bankruptcy proceeding as a physician in another state, who has performed professional services for the bankrupt and is scheduled as a creditor. Each must submit to the finding of the bankruptcy court as to the value of the services rendered by him. But in this connection counsel argue that when a transaction is re-examined under section 60d, the bankruptcy court must hold the transaction void, except as to those services rendered which were beneficial to the estate. This proposition is based upon the decision in In re Habegger, supra. It is true the court in that case held that, upon a re-examination of a transaction within the provisions of section 60d, the bankruptcy court could declare the attorney a preferred creditor only to the extent of the value of the services rendered, which were beneficial to the estate, and the transaction in excess

thereof should be declared void. It seems to us that if congress intended that in a proceeding under section 60d the bankruptcy court should allow the attorney only for services rendered beneficial to the estate, then the words "solicitor in equity and proctor in admiralty" would not have been used in this section.

Pratt vs. Bothe, 130 Fed., 670, 673.

But it should be noticed that the court did not, in the Habegger case, hold that the bankruptcy court did not have jurisdiction to re-examine such a transaction *unless* a part of the services rendered by the attorney were beneficial to the estate. In fact, in that very case it was found that none of the services of Attorney Fowler were beneficial to the estate, but still the court held that it was proper for the transaction to be re-examined by the bankruptcy court, upon the petition of the trustee, and that the prayer of the petition should have been granted. That case, therefore, goes merely to show the extent the attorney is to be declared a preferred creditor, and does not attempt to limit the jurisdiction of the bankruptcy court to re-examine such transactions to cases where the services rendered were beneficial to the estate, and deny jurisdiction in cases where the services rendered were not beneficial to the estate. Besides, if the jurisdiction of the bankruptcy court in this proceeding depended upon the character of the services for which petitioners were allowed the sum of $800 in this proceeding, the bankruptcy court must be held to have had jurisdiction, because the evidence offered in this proceeding, and upon which the court made petitioners, as preferred creditors, an allowance of

$800, is not before this court, was not before the Circuit Court of Appeals, and is not a matter for consideration here.

3. On page 22 of petitioners' brief, counsel frankly take the position that the facts upon which this proceeding is based could not be the basis of a suit to avoid a preference under section 60, subdivision b, nor be made the basis of an action to recover property transferred to hinder, delay, or defraud creditors under section 67, subdivision e, and in this we believe counsel are correct. But when we come to examine the argument made by counsel in which they attempt to show that this proceeding can not be maintained, we find that their entire argument is based upon the opinions of this court and other courts in cases which were brought under these particular provisions of the bankruptcy act, namely, section 60b and section 67e. Here, then, is the fallacy of their entire argument. They admit, as they must admit, that the facts in this proceeding do not make a case under those provisions of the act, and yet they insist that this proceeding is wrong because it does not conform to the practice which is laid down for cases which do come within those particular provisions of the bankruptcy law. The summary jurisdiction which a bankruptcy court may exercise in cases under section 60b and section 67e is, by virtue of the general powers given it by the bankruptcy act, to administer the estate. But the summary jurisdiction which is exercised in this proceeding by the bankruptcy court is by virtue of an express provision giving it such power.

Counsel say that by section 2, subdivision 7 of the act, courts of bankruptcy are given the power to "cause the estates of bankrupts to be collected, re-

duced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided," but that the clause, "except as herein otherwise provided," refers to section 23, by which the trustee is relegated to a plenary suit, and that this transaction can not, therefore, be re-examined in a proceeding in the bankruptcy court. When we come to examine the act, however, we find an express provision, section 60d, giving the court of bankruptcy express power to re-examine a transaction such as was set out in the petition in this proceeding, and providing that it shall be re-examined by the court upon the petition of the trustee or any creditor, thus providing clearly and expressly that such a transaction shall be re-examined in a proceeding in the bankruptcy court itself. But, is the language of section 23 so much in conflict with section 60d that both sections can not be upheld, and must section 23 be allowed to stand and be given effect, and section 60d fall and be disregarded? The language of section 23 is that "the United States Circuit Courts shall have jurisdiction in all controversies, *at law and in equity,* as distinguished from *proceedings in bankruptcy,*" etc. There certainly is no conflict between this section and section 60d, for the latter expressly provides that such transactions shall be re-examined by the "court," meaning the "court of bankruptcy," and that such re-examination shall be had upon the petition of the trustee or any creditor, clearly making such a re-examination a *proceeding in bankruptcy* as distinguished from a controversy *at law or in equity.*

It seems to us counsel are willing to discuss anything in their brief except the plain and express terms of section 60d. They say they ought not to be

deprived of their title to their property in such a proceeding as this; that they ought not to be bound by the judgment of the bankruptcy court, which can not be reviewed, and from which they have no appeal, and to disobey which will put them in contempt of court. But, are they deprived of any of their property by the decision of the bankruptcy court in this proceeding? Has the bankruptcy court entered any judgment which it may attempt to enforce against petitioners by means of execution, contempt proceedings, or otherwise? The only effect of the order entered by the bankruptcy court is to find the value of certain services which the petitioners rendered the bankrupt, and to declare the petitioners preferred creditors of the bankrupt estate to that extent. They have been deprived of no more rights than the physician who has rendered services for the bankrupt and his family, which he considers worth $200, but is allowed $100 only. These propositions are so plain that further discussion of them is unnecessary.

THE PURPOSE OF SECTION 60d.

It is true that the provisions of section 60d differ from the other provisions of section 60, in that they relate to a transfer for a particular purpose, transfers to particular classes of persons, and in addition prescribes a special proceeding to be resorted to in the bankruptcy court by the trustee, or any creditor, before the trustee can attempt the recovery of the balance of the money thus transferred. Congress d[illegible] not, as in the former subdivisions of the

section, make it a condition precedent to a recovery, that the transaction occurred within four months of the filing of the petition, nor that the attorney and counsellor at law, solicitor in equity, or proctor in admiralty, knew, or had reasonable cause to know, that the money or property was transferred to him as a prefrence; but congress had the constitutional power to do this, and many reasons may be suggested why this special provision for this particular class of transfers to particular classes of individuals was deemed wise by congress.

1. The clases of individuals enumerated, namely, attorneys and counsellors at law, solicitors in equity, and proctors in admiralty, are usually paid for their services, either in whole or in part, in advance. This is not true of transactions with doctors or merchants, for instance, and such a provision with reference to them would, therefore, be unnecessary.

2. Where an insolvent is in fear of an involuntary petition being filed against him, he naturally resents it and is likely to attempt to defeat it and to prefer to sacrifice a large, or even the greater part of his assets in attorney fees rather than submit to involuntary bankruptcy. The attorney is unwilling to be engaged unless he is paid in advance, and the insolvent is liberal with the assets which under the bankrupt law really belong to his creditors. If the proceeding is a voluntary one, the insolvent may desire to accomplish certain results in the course of the bankruptcy proceedings, and before the filing of the petition, being desirous of providing himself with attorneys, he is willing to pay them a handsome retainer for services to be rendered in the future.

For these reasons and others that might be mentioned, congress has made this special provision in regard to the payment of money or the transfer of property to attorneys and counsellors at law, solicitors in equity, and proctors in admiralty, for services to be rendered by one who contemplates the filing of a petition by or against him. Without this provision, is there any reason why an insolvent might not go to an attorney, ignorant of his insolvent condition, and pay him a handsome retainer for services to be rendered in the future, and virtually place the principal part of his estate in the hands of attorneys and beyond the reach of the bankruptcy court? Could an attorney, who had entered into such a contract in good faith, who stood ready to perform it, or had partially performed it, and had put himself in a position where he would not, and could not, be employed by others, be required to surrender to the bankrupt's estate the retainer which had thus been paid him, if the bankrupt act did not contain this provision? Money paid under such circumstances could not be recovered under section 67e or 70e, because the attorney would be a bona fide holder and for a present consideration, and because, in addition to agreeing to perform the services, he had placed himself in a position where he could not and would not be employed by others.

The purpose of this provision is, therefore, plain, but whether it is wise or necessary we need not inquire. Congress had ample power to give the bankruptcy courts jurisdiction to re-examine such transactions, in an administrative proceeding, in that particular court, and it has conferred that power in terms too plain to be construed away.

PETITIONERS ARE CREDITORS.

We believe the authorities we have cited, taken in connection with the plain terms of the statute itself, clearly demonstrate that Question One must be answered in the affirmative. A line of reasoning to which petitioners are, we believe, committed in their brief, also seems to lead inevitably to the same result.

In their brief, counsel clearly point out that an attorney who is a party to a transaction which is covered by the provisions of section 60d, is a preferred creditor. Counsel say:

> "It is well to bear in mind that section 60 of the bankrupt act deals with 'preferred creditors;' that such definitive words are incorporated in and made a part of the section (see Bardes vs. Bank, 178 U. S., 524, 534), and that the portion of the act relied upon by the trustee is subdivision d of this same section.
>
> "In section 60 congress was dealing with creditors, and preferred creditors at that." (Petitioners' brief, bottom page 5 and top of page 6).

An examination of section 60 of the bankrupt act clearly shows that it is not only entitled, but it does deal entirely with preferred creditors. Subdivision a defines what a preference is; subdivision b describes the conditions under which the property conveyed or its value may be recovered by the trustee from the preferred creditors, and subdivision c provides for a set-off against a preference. While these

subdivisions of the section have to do with preferred creditors, it should be noticed, also, that the purpose of the provision is to enable the trustee to recover the preferences for the benefit of the estate.

Now, subdivision d, the part of the section in which we are particularly interested, provides that if, in contemplation of bankruptcy, a bankrupt has paid money or transferred property to an attorney at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court, on petition of the trustee or any creditor, and the transaction shall be held valid only to the extent of a reasonable amount, to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

As pointed out by counsel, an attorney under these circumstances is a preferred creditor. Why is he a preferred creditor? Because, under this provision of the bankrupt act, a transaction such as is involved in this proceeding is made a voidable one by the terms of section 60d, and the court is given the power to inquire into the transaction, on petition of the trustee or any creditor, and to avoid the transaction and to separate the valid from the void, and upon such a re-examination the value of the services which the attorney has rendered becomes a preferred claim in favor of the attorney, and the balance becomes an asset of the estate to be recovered by the trustee. When a transaction comes within this subdivision, and in a proceeding under this section the court determines the reasonable value of the services rendered by the attorney, a valid claim is thereby determined in favor of the attorney, and he, therefore, be-

comes and is treated as a preferred creditor. It was, therefore, proper to place this subdivision under the title of "preferred creditors." And it is also shown by counsel that the parties to a proceeding in bankruptcy "include the bankrupt, the trustee, and all creditors" (see Petitioners' Brief, top of page 11).

But notwithstanding counsel agree with us that an attorney under these circumstances is a creditor of the estate, and, therefore, a party to the proceeding, still they maintain that the amount of his claim can not be determined in the court of bankruptcy in which the bankruptcy proceedings are pending, unless he lives within the territorial limits of the district, and is served with process within the district. It must be remembered that in a proceeding of this character the bankruptcy court is not attempting to render a judgment against the attorney or require him to turn over money or property to the trustee, but is simply inquiring into the question of the amount of his claim against the bankrupt for services rendered, just as it would in a case where a physician has rendered services to the bankrupt, and the court determines the value of those services. It may be the physician resides in another state, and he may think a judge or jury in his own state would allow him a larger sum for his services than a bankruptcy court in Colorado, and the attorney may prefer to have his claim determined in his own state court; but under the bankruptcy act both must submit to the finding of the court in which bankruptcy proceedings are pending. Now, what is the difference between the position of the physician and the position of the attorney in this respect under the bankruptcy law? There is no difference so far as the necessity

for a plenary suit is concerned; but there is this difference in the manner of the examination of their claims: In the case of the physician nobody can object or is injured if he does not see fit to present his claim and have it allowed, for if he does not, he, alone, suffers, and the other creditors secure a larger share of the assets; but in the case of the attorney, the trustee and the creditors are interested in having the amount of his claim determined so that the excess, if any, may be recovered for the benefit of the estate. The bankrupt act, therefore, does not, as in the case of the physician, leave it to the attorney's discretion as to whether the amount of his claim shall be determined, but gives the bankruptcy court the right to determine the amount of such a claim on petition of the trustee or any creditor. Is there any reason why the attorney should have the right to have the question of the reasonable value of his services determined in a plenary suit any more than that the physician should have that right? Is there any reason why it should be required to serve the attorney with a writ of subpœna within the territorial limits of the district in which the bankruptcy proceedings are pending any more than that the physician should be so served before his claim against the bankrupt may be entirely wiped out and lost? In the case of the physician, a notice is mailed to him wherever he may be, and he is bound by all the bankruptcy proceedings in the court where the estate is being administered. By the plain terms of the act the transaction between the attorney and the bankrupt is to be re-examined in a *proceeding in the bankruptcy court*, and that court alone has jurisdiction to re-examine it. All proceedings in bankruptcy are had

simply upon notice to the parties interested, and without service of process except in the case of the bankrupt himself, and yet counsel for petitioners contend that in the case of this particular proceeding in bankruptcy regular process must be served, which can be served only within the district.

If petitioners' position is right, what will result? It is plain that the trustee can not maintain a suit against petitioners under section 60b, nor under section 67e; that no plenary suit whatever will lie against them until this transaction has been re-examined under section 60d, and that the bankruptcy court in which these bankruptcy proceedings are pending is the only court that has the power to re-examine this transaction. If, therefore, petitioners can defeat this proceeding, they will be able to retain $9,000, which belongs to the creditors of this estate, and for which they have rendered no service or given anything of value.

We believe there should be no such result in the face of the plain and express terms of the bankruptcy act. And counsel's argument also leads to this absurd conclusion, namely, that if a bankrupt has attorneys in two districts where he has property, and makes to each the same payment for like services to be rendered, the transaction in the district of the adjudication can be re-examined, but the other can not, and recovery can be had in the former case, while in the latter the attorney will be entitled to retain the entire sum paid him. The bankruptcy act is remedial, and should be interpreted reasonably and according to a fair import of its terms with a view to effect its objects.

Question Two.

This question calls particular attention to one feature of Question One. It is unnecessary to discuss this question at length, for if our argument in regard to Question One is correct, then Question Two must likewise be answered in the affirmative.

Question Three.

This question can not be answered in the affirmative, unless it is held:

1. That this transaction may be re-examined in a plenary suit, without the preliminary proceeding having been taken in the bankruptcy court, as provided by section 60d.

2. That the District Court has jurisdiction in a case of this character.

3. That in a plenary suit, in the District Court, service of process can be made outside the district.

As we believe we have shown in our argument, in regard to Question One, the court of bankruptcy is given exclusive jurisdiction to re-examine such a transaction as is involved in this proceeding, before any suit can be maintained by the trustee to recover any excess, and therefore a plenary suit can not be maintained in the first instance.

If such a plenary suit would lie in the first instance, then we believe with counsel for petitioners that the District Court would have no jurisdiction in such suit, unless the case comes within section 60b or section 67e, and with them we believe a case under neither of those sections could be made out of the transaction involved in this proceeding. The facts to

be proved under those sections are very different from those necessary to be proved in the proceeding under section 60d.

If a plenary suit of this character could be maintained in the District Court, the only judgment that could be rendered in favor of the plaintiff would be a personal judgment against the defendants for the excess over and above the reasonable value of the services rendered by them, and to obtain such a judgment personal service of process upon the defendants would necessarily be required. We know of no case where, in a plenary suit, the relief asked for being a personal judgment against the defendants, process can be served beyond the territorial limits of the District. This phase of Question Three does not seem to have been noticed in the brief of petitioners.

For these reasons we believe Question Three must be answered in the negative, and the result is that if this proceeding can not be upheld, then petitioners will be allowed to retain $9,000, which they wrongfully withhold, and which, under the bankrupt act, belongs to the creditors of this estate.

We respectfully submit that Questions One and Two should be answered in the affirmative, and Question Three in the negative.

Respectfully submitted,

HARVEY RIDDELL,
Attorney for Wilbur F. Denious, Trustee,
Respondent.